DEPARTMENT OF AMAZONAS, Plaintiff, v. PHILIP MORRIS CO., Defendants.	:	CV-00-2881 (NGG) December 21, 2000 Brooklyn, New York
DEPARTMENT OF ANTIOQUIA, Plaintiff, v. PHILIP MORRIS CO., Defendants.	:	CV-00-3857 (NGG)
DEPARTMENT OF MAGDALENA, Plaintiff, v. PHILIP MORRIS CO., Defendants.	:	CV-00-4530 (NGG)

TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE VIKTOR V. POHORELSKY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

APPEARANCES:

For the Plaintiff: JOHN J. HALLORAN, JR., ESQ.
KEVIN MALONE, ESQ.
FRANK GRANITO III, ESQ.
CARLOS ACEVEDO, ESQ.

For the Defendant: CRAIG STEWART, ESQ.
IRVIN B. NATHAN, ESQ.
RONALD S. ROLFE, ESQ.
MARY McGARRY, ESQ.
DAN RUSSO, ESQ.

Audio Operator:

Court Transcriber: ELIZABETH BARRON
328 President Street, #3
Brooklyn, New York 11231
(718) 596-3802

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Proceedings recorded by electronic sound recording, transcript produced by transcription service

THE CLERK: Civil cause for oral argument, CV-00-2881, CV-00-3857 and CV-004530, Department of Amazonas, et al. against Philip Morris Companies, et al.

Counsel, please state your appearances for the record.

MR. HALLORAN: Good afternoon and may it please the Court. My name is John Halloran from the law firm of Speiser, Krause, co-counsel for the plaintiffs, the Department of the Republic of Colombia. With me to my immediate left is Kevin A. Malone from the firm of Krupnick, Campbell, also attorney for plaintiffs. To Mr. Malone's left is Frank H. Granito, III, who is with the firm of Speiser, Krause, Nolan & Granito, also counsel for the plaintiffs in this case.

In the back of the courtroom with us today is Ivonne Walteros, who is the counsel to the legal directorate to the Secretary of the Treasury for the City of Bogota. She is speaking with a translator and listening to the court proceedings through a translator. So for the Court's convenience, we've asked her to sit in the back of the courtroom. She may opt to speak at a later time.

With her is Carlos Acevedo, also with the law firm of Krupnick, Campbell, Mr. Malone's associate, counsel for plaintiffs.

MR. ROLFE: Your Honor, may it please the Court.

My name is Ron Rolfe from the law firm of Cravath, Swaine & Moore. I represent British American Tobacco Investments, Limited and my colleague in the back of the courtroom, Dan Rottenstrike (ph) is also with me here today.

MR. NATHAN: Good afternoon. May it please the Court. My name is Irv Nathan. I'm with the law firm of Arnold & Porter in Washington D.C. I've been admitted pro hoc vice for this case and we represent the Philip Morris defendants in this case. With me is my colleague Craig Stewart from our New York office.

MS. McGARRY: Good afternoon, your Honor. Mary Elizabeth McGarry from Simpson, Thacher & Bartlett for defendant BAT Industries PLC.

THE COURT: How is that distinguished from Mr. Rolfe's client?

MS. McGARRY: My client is a parent company of Mr. Rolfe's client. My client will be making a jurisdiction motion. Mr. Rolfe's client that he identified will not.

THE COURT: A jurisdiction motion. Is that assigned to me?

MS. McGARRY: No.

THE COURT: Is that everybody?

MR. RUSSO: Good afternoon, your Honor. Dan Russo with the law firm of Jones, Day, Reavis & Pogue. We represent RJ Reynolds Tobacco Company, RJ Reynolds Tobacco

International, Inc. and RJ Reynolds Tobacco Holdings, Incorporated, defendants only in the European Community case.

THE COURT: Let me just ask first of all whether the European Community case -- what's the relationship? I know the claims are similar but has Judge Garaufis consolidated the European Community case with the Amazonas case for purposes of the disqualification motion?

MR. HALLORAN: He has not, your Honor.

THE COURT: So the only thing before me now as far as disqualification is the Amazonas case.

MR. HALLORAN: That's correct.

THE COURT: Mr. Nathan, do you have a different view?

MR. NATHAN: No. I think the only thing before you today is the Amazonas case, the Colombia Departments. But the judge did say at the hearing that we should take up with you the relationship of the European Community case. I'd ask the Court and I will repeat at the end of today's proceedings --

THE COURT: To the extent that you can speak up, it would be useful. Not only useful, it's absolutely necessary.

MR. NATHAN: At the end of today -- I'd like us to

go forward with our arguments dealing with the Colombia cases. But at the end of today's session, I would like to address the European case and in particular a request -- what we requested of the Court and the Court said to take it up with your Honor, is access to the retainer agreement that these counsel have with the European community. We've not seen that and therefore we need to see that and any related earlier versions and drafts of that, in order to know whether the problems are the same in both cases.

THE COURT: Okay.

MR. MALONE: Your Honor, if I may. I don't want to be preemptive about this but I think it's important that you know going into it that this is something that the defendants have not brought before the Court by way of any sort of motion.

THE COURT: I understand. We'll deal with that later. There's no reason to tarry on that right now because we're going to talk about it later.

The reason we got together was I wanted to hear some argument on the disqualification motion, which is right now the only thing that I think is assigned to me, although Mr. Nathan suggests that Judge Garaufis suggested to him that he take up the other matter, the disqualification or potential disqualification matter as it relates to the European Community case.

Let me say one thing further before we get started. Mr. Stewart and I served in the U.S. Attorney's office together a number of years ago. I left that office in 1990 and we haven't had any substantial contact since then. I don't think we ever worked on anything together while we were in the office. We saw each other from time to time. I'm confident that notwithstanding my fond feelings for Mr. Stewart, that that won't in any way affect my decision-making in this case, but I thought I'd let you all know.

It's the defendant's motion. RJ Reynolds is not in this case.

MR. RUSSO: That's correct, your Honor.

THE COURT: It's just Philip Morris and I guess BAT.

MR. ROLFE: Yes, your Honor.

THE COURT: Is Brown & Williamson in this case.

MR. ROLFE: Your Honor, Brown & Williamson is in this case. They're not appearing here today. The motion is made on behalf of all the defendants who have appeared and who do not contest jurisdiction.

THE COURT: And Brown & Williamson contests jurisdiction.

MR. ROLFE: It does not, your Honor. It does not contest jurisdiction. It didn't see any reason to multiply

the lawyers.

THE COURT: So I'll hear from the defendants first, although I'd just as soon put questions to you as opposed to just having --

MR. ROLFE: Your Honor, I'm perfectly happy to do that.

THE COURT: It's Mr. Halloran?

MR. ROLFE: I'm Rolfe.

THE COURT: I'm sorry. I'll get you all straight.

It seems to me from my review of the materials that the Second Circuit takes a pretty restrained view of disqualification and indeed has set out not only that Armstrong case but it's endorsed it in some other cases, that the only basis for doing it is if the trial is somehow going to be tainted by the proceedings.

Do you disagree with that?

MR. ROLFE: Your Honor, I disagree with that narrow statement. Mr. Nathan has been prepared to address the remedy issue. I have been prepared to address the choice of law question and the question of a violation under New York Law and why Louisiana Law has no place in this proceeding. I can answer that in two minutes but if Mr. Nathan would like to take over for me, I'm happy to yield to him.

THE COURT: What were you going to say about the

choice of law? I'm prepared to accept, at least for purposes of disqualification in a case that's going on in a New York court, that I've got to be guided by New York Law insofar as it states the ethical principles that ought to be used to analyze the conduct.

MR. ROLFE: Then I've done my job. But I do think, your Honor, that this is a case that doesn't come along very often. It's not Armstrong, it's not Bottaro (ph). Those are cases that involve the trial itself. Rarely do you have a situation where you have a retainer agreement at the beginning of a lawsuit that reflects so clearly violations of New York Law.

THE COURT: I don't necessarily endorse that. Tell me what the standard is that I have to apply, if it's not the one that comes out of Armstrong and Bottaro.

MR. ROLFE: Your Honor, I'm not saying that that's not the standard. I think to focus on the trial, when those cases were trial settings --

THE COURT: But isn't that what those cases say?

MR. ROLFE: Those cases were trial settings. They implicated the witness rule, they implicated other things that do bear directly on presentations at trial.

THE COURT: So why is this different?

MR. ROLFE: There are at least two cases in the Southern District, your Honor, that we have cited in our

brief.

THE COURT: Which ones are those?

MR. ROLFE: I'm going to let Mr. Nathan give you the names. This is per se an implicit taint situation, but rather than go on with my theories, Mr. Nathan is prepared for this.

THE COURT: You were going to address choice of law.

MR. ROLFE: I was.

THE COURT: You already won. Well, maybe you already won. We'll wait and see what the other side has to say.

MR. ROLFE: Then I need to address the violation issue.

THE COURT: Violation of what?

MR. ROLFE: Violation of the ethical rules of this Court and the Code of Professional Responsibility. There are flat-out violations in many parts of this contract.

THE COURT: I know, but I don't know if that's the inquiry. That's not my inquiry. My inquiry is whether any violations that may exist, it seems to me, violate the -- are such as to satisfy the strict standards for disqualification that I see coming out of the Second Circuit cases. In other words, this Court is not a roving panel for deciding what the disciplinary rules are or how they should

be interpreted. There are other fora for that to be decided by people who are probably much more attuned to what needs to be considered when we're examining conduct of attorneys.

It seems to me that the Second Circuit has narrowed our function not to look at every claimed unethical conduct but to see whether any of the claimed unethical conduct somehow taints the proceedings. So that's what it seems to me I'm guided by. I'll come back to you at some point, because I'll be asking you specifically that question, as to how any of these particular things that you've cited here really taint the process. Maybe Mr. Nathan will convince me that I have to broaden my view.

MR. ROLFE: I hope so, because I think all of them taint the process and all of them taint the proceeding in an way that makes this case against the basic public policy of New York. But I'm going to let Mr. Nathan pick up.

THE COURT: Okay.

MR. NATHAN: May it please the Court. I would like to address the issue that you have raised. I think that while I agree with you, your Honor, that disqualification is disfavored and there is a heavy burden for the moving party to obtain disqualification and the remedies that we are seeking here, I do not think that the restrained view that you have given to it is the view of the Second Circuit.

I think that in the Second Circuit, your Honor, at least for 25 years, the standard has been set in the Saramko (ph) case --

THE COURT: I don't agree with you. I've already looked at that. I don't agree with you. Bottaro and Macalpin (ph), whatever those cases are, came after Saramko, cited to Saramko, and they made it very clear -- I don't think you should tarry on that. Tell me why Saramko has come back into favor.

MR. NATHAN: Because the latest case is the Getner against Schulman (ph) case, which is 1995 and cites Saramko as well as Armstrong and suggests --

THE COURT: That was a passing reference. They didn't even deal with the issue of disqualification really. They were talking about the Rooker Feldman (ph) case.

MR. NATHAN: With all due respect, your Honor, I do not agree with that. I do not think that that is only dicta in the Getner case because, your Honor, the question there was -- Judge McEvoy in the Northern District held that there should be a hearing on this question.

THE COURT: On the question of what?

MR. NATHAN: On the question of whether or not the law was clear and the facts were undisputed with respect to the disqualification of the attorneys by the state court. Judge Vangraflin (ph), speaking for a unanimous panel,

including Judge Newman of the Second Circuit, said that the law was clear on the subject and therefore there was no need for a hearing. What the Second Circuit said, your Honor, that was undisputed was that a trial judge is required to take measures against unethical conduct occurring in connection with any proceeding before him. And, your Honor -- this is 1995 -- the Second Circuit, citing Saramko, said --

THE COURT: It's his duty and responsibility to disqualify counsel for unethical conduct prejudicial to counsel's adversary.

MR. NATHAN: Correct. The way I think the cases have gone since the Saramko case, since 1975, dealing with the Armstrong, Bottaro and the Brown case, your Honor, which is a 1999 decision --

THE COURT: What case are you talking about?

MR. NATHAN: Brown against City of Oneada (ph), which is a Second Circuit case, 203 F.3d 153, which also cites to Armstrong and to Bottaro. It says that there must be a showing that the proceedings were somehow tainted by counsel's conflict of interest or ethical violations. That's the question here, your Honor, two things.

In Armstrong, the court said you have to look at two things. One is, has the adversary process been jeopardized? Is the integrity of the system affected by the

ethical violations? The second is, has there been a taint? In Armstrong and in Bottaro, the question was about trial counsel appearing at trial. In Bottaro, that was particularly clear because the issue there was whether a lawyer was going to serve as a witness as well as a lawyer, whether the firm from which he came was going to be a witness as well as the advocate.

THE COURT: That's in the Brown versus Oneada case?

MR. NATHAN: In Brown against Oneada, at page 155, your Honor, what the court says is it interprets the Bottaro case -- I'll quote it. It says, "This Circuit requires not only an appearance of impropriety but also a showing that the proceedings were somehow tainted" --

THE COURT: Right. It goes right back to Armstrong and Bottaro. It doesn't talk about Saramko being the guiding principle. It wouldn't surprise me at all if the law clerk who wrote Getner never ever paid attention to Bottaro. They don't even talk about Bottaro or Macalpin. They're just using that as a -- they weren't dealing with -- they weren't looking at the issue in Getner of whether or not some particular conduct required disqualification. They didn't want any part of it. They said, it's clearly a matter within the court's control. You're basically looking to appeal to us to look at that decision. It looked to me

like they just wanted to get rid of this.

MR. NATHAN: Your Honor, my point with the Brown case is that the way that Bottaro is interpreted goes to proceedings, it's not only to the trial.

THE COURT: Okay. I'm prepared to accept that.

MR. NATHAN: Even though I think there have been a number of cases since -- well after Bottaro, in which the District Courts and the Second Circuit have disqualified attorneys for the kinds of violations -- having a proprietary interest --

THE COURT: Proprietary interest. I do remember seeing some case in the Southern District where the lawyer was going to share 50/50 in the proceeds, because he also happened to be a shareholder, I think, in the corporation. But that's not what's going on here.

MR. NATHAN: No, but I think -- I would like to discuss with you -- if you believe that the only standard is the proceedings are tainted, them I'm happy to take that as the standard and to suggest to you that the violations here taint these proceedings in an absolutely dramatic and unacceptable manner and require both disqualification and dismissal without prejudice. I'm prepared to discuss why that is, so that taking even that standard, and I suggest the standard needs to be a little broader than that, but I'm prepared to take the lesser standard.

THE COURT: The thing is I still don't understand what Getner adds to this in any event.

MR. NATHAN: What Getner adds is that the Court has to look at what the ethical violations are and at least see if they taint the proceedings, so you have to know what the ethical violations are and how they will impact on the proceedings. It isn't enough to say, I'm going to apply the standard but I'm not going to look at the ethical violations.

THE COURT: Of course. But just because there are ethical violations doesn't mean that there's a disqualification. The ethical violations have to be looked at in a pretty narrow way, to see whether they really have a prejudicial impact on the adversary.

MR. NATHAN: Exactly.

THE COURT: Typically the situation is conflicts of interest where counsel's interests are conflicted so that he's not adequately going to represent the interests of his own clients or, in the more common cases, if somehow he has information that he shouldn't -- confidential information from the adversary or relating to the adversary that could be used against the adversary.

MR. NATHAN: That is absolutely true but it is not the exclusive means with which you can taint proceedings.

THE COURT: I'm prepared to hear -- because you

agree that that's not happening here.

MR. NATHAN: What?

THE COURT: The first two things aren't implicated here.

MR. NATHAN: I agree with you, it's not a situation of prior representation and it's not a question of the confidential information. That's agreed. The question is, what is involved here? There are three things that are involved here. These plaintiffs under the plain language of the retainer agreement are the banker for the lawsuit, they are the insurer of the lawsuit, and most significantly, they are the owner of the lawsuit.

Let me just tell you the three provisions of the retainer agreement, what they are and how they violate the law and the ethics provisions. And it is our contention, and I think it is virtually undisputable from the facts, that but for these three principles, this lawsuit would not have been brought.

THE COURT: But wait a minute. That's not the kind of prejudice they're talking about. That is not the kind of prejudice the Second Circuit is talking about. As a matter of fact, I think it may even come out of Saramko. That's one thing that the court, as I recall, specifically said -- prejudice doesn't flow from the fact that you're subject to a lawsuit. Prejudice flows because somehow you

are disadvantaged in the lawsuit because the adversary has that particular lawyer.

MR. NATHAN: Your Honor, with respect, I don't think that that is accurate. The point is the policy in New York, as reflected both in a penal statute and in the ethics rules, is twofold. One is there shouldn't be champerty. There shouldn't be a sale of the lawsuit to the lawyers and lawsuits shouldn't be brought based on a sale to the lawyers and --

THE COURT: Is there any Second Circuit case that has ever disqualified a lawyer because of champerty?

MR. NATHAN: That's a question. There have been Second Circuit cases that have said if the facts warrant it, we would disqualify for champerty. They didn't find that it was warranted.

THE COURT: Which one?

MR. NATHAN: I have to find the cite for that one.

THE COURT: I'd be curious to see that one. I haven't made an exhaustive survey of the Second Circuit cases but I certainly didn't find one in the ones I saw.

MR. NATHAN: But it follows, your Honor. If the policy of the State is not to allow champertous lawsuits and if it is found that this is a champertous lawsuit which shouldn't have been filed and was only filed in violation of those ethical and penal provisions, it cannot be allowed to

go forward, with that counsel being rewarded for its conduct or the lawsuit to stand.

What has to happen, your Honor, if that is what has happened and I want to demonstrate why it is, we have to go back to be unprejudiced by that. That's exactly what they were saying in Saramko and Getner. If you're prejudicing your adversary -- I agree in a normal lawsuit, that is not the prejudice that we're talking about. But if it's a lawsuit that would not have been brought but for the ethical violations, ethical violations which were designed to prevent the filing of such lawsuits, it can't be that you say, okay, they violated the ethics rules, you're prejudiced by a lawsuit that wasn't supposed to be brought, and the case just goes forward and we'll take this to the ethics panel, especially --

Bear in mind, your Honor, when we talk about other forums, we in my judgment are doing what we have to do here at the earliest stage of this proceeding, in order to avoid prejudice to the entire matter, because if at the end of the day, if in several months or six months down the line or a year down the line, the Committee on Grievances of this Court decides that this conduct was so egregious that these lawyers should be stricken from the roles of this Court, which I suggest is a possibility here in light of the egregious nature of the serial ethical violations, then

where are we going to be when, by the result of that proceeding, these guys are knocked out?

I think it's the obligation of the Court to take a look at it right at this stage, and the relief that we're seeking is not only disqualification but having the plaintiffs have the option, without any prejudice, to get independent counsel to look at the merits of their case, to see what they've got. Then we can proceed.

THE COURT: I get the drift.

MR. NATHAN: Let me say what the ethical violations are and why they have tainted the proceeding and why this suit would not have been brought but for those ethical violations.

THE COURT: Doesn't that necessitate an inquiry into what induced a client to hire a particular lawyer? Doesn't that require the Court to get involved in a hearing, a completely satellite proceeding, where we're going to delve into the attorney/client relationship, come perilously close, it seems to me, to attorney/client privilege matters, and only because of your contention that the case wouldn't be brought otherwise. Wouldn't we be encouraged to do that in practically any case in which there's a retainer agreement -- I mean a contingency fee agreement?

MR. NATHAN: No, your Honor. The absolutely unprecedented nature of this retainer agreement, as

demonstrated by the affidavits of Charles Wilfram (ph) and Professor Ziegler (ph) in this Court -- Professor Wilfram, who is an outstanding expert, whose books have been cited by the Supreme Court, says that in 25 years of looking at these things, he's never seen a retainer agreement like this.

I think two things. One, if you will permit me, on the face of the agreement and given the facts that are indisputable and have come only from the plaintiff's words and documents, I can demonstrate to your complete satisfaction that but for these violations, the suit would not have been filed. I also tell you that if you have doubts about it, under Second Circuit law, as you know, doubts are supposed to be resolved in favor of disqualification.

Third, I say to you that if you have such doubts as to whether or not this induced it, yes, I think it is right that we should have an evidentiary hearing and on that point, let me say two things as well. Number one, the retainer agreements and the negotiations of legal retainer agreements are not privileged under the law of the Second Circuit. Second, in this situation, if there had been a privilege, it had been waived because in their opposition papers, the plaintiffs have put in affidavits of their clients talking about what induced them, what didn't induce them and how things --

THE COURT: Why shouldn't I accept that at face value?

MR. NATHAN: Because, your Honor --

THE COURT: Why?

MR. NATHAN: We've had no opportunity to cross-examine, we've had no opportunity to see the documents, and I represent to this Court that based on the facts that we know from the indisputable facts and the ones that we can reasonably infer, I do not think those facts that have been presented are fair or accurate. I think that with access to document discovery and --

THE COURT: Why should the Court get bogged down in conducting a hearing on that -- you're going to want discovery on it. Then you want to cross-examine -- you're going to want to take depositions of witnesses, cross-examine the witnesses. We're going to have to go through 26 different departments, perhaps, to find out exactly what induced them to sign on to this deal. Also, you can demonstrate that they wouldn't have brought the case if an agreement hadn't been struck in precisely that way.

MR. NATHAN: Let me address that and then we'll come to whether we need this hearing, which I don't think we need because I think it's obvious from the agreement.

THE COURT: I just don't understand why I can't accept their statement at face value. They know what caused

them to bring the lawsuit. If they're not troubled by the fact that -- the Champerty Statute doesn't seem to me like it was designed -- well, go ahead. I'll let you continue.

MR. NATHAN: Thank you, your Honor. There are three different violations we're talking about here, actually four and one that will absolutely affect the trial. With respect to the bringing of the lawsuits, you have to understand that this agreement says, in violation of the New York Code of Professional Responsibility, that the lawyers will pay all the fees and all the expenses and will not recover them and will not look to the departments to recover them unless there is a recovery in the suit. That's a violation of the principle that the client has to be responsible.

THE COURT: Tell me precisely how that taints the proceedings.

MR. NATHAN: I think you have to put all three of these together. I'll be happy to do that. The first two go together because I think you have to look at it in this way. The plaintiff's lawyers here, as I said, are the banker for the lawsuit --

THE COURT: That's not unusual. That's often the case.

MR. NATHAN: Not having the right to recover the expenses is not only not usual, it's not permitted.

THE COURT: I understand that that's what the rule says, but the reality is that in virtually all personal injury cases, contingency fee agreements are permitted. And in all those cases, virtually all the cases, the lawyer is the banker, advances all the expenses. I think that it's not a secret that when cases are not winners, lawyers are never looking to their clients for reimbursement of those expenses.

MR. NATHAN: I agree with your Honor, and if that's all we had here, we wouldn't be here. But it's important that that's number one. Number two -- you could not show me a single agreement in America that's ever been sanctioned by a court or ever been entered into, which says that the lawyers will indemnify the clients from anything related to this case.

If there is a sanction order entered by the District Court or by the magistrate, if there is a counterclaim and a judgment --

THE COURT: A counterclaim for limited matters, though, it seems to me. Didn't it say just a counterclaim for libel or slander and whatnot. It's in a limited sort of sense.

MR. NATHAN: I don't think it's so limited but it's a counterclaim that's based on the nature of the allegations that are made in the complaint.

THE COURT: That's not going to happen. In essence, you can't make a counterclaim -- maybe a counterclaim for abuse of process.

MR. NATHAN: Your Honor, I think what's missing here, if you'll let me -- let me proceed.

THE COURT: All right, I'll let you finish. I keep interrupting you.

MR. NATHAN: I understand the Court's skepticism but let me explain why I think this is critical and why it demonstrates that but for these provisions, these lawsuits would not have been brought.

THE COURT: Okay. That's your prejudice. You're saying the lawsuits would not have been brought but for these violations.

MR. NATHAN: I have two grounds of prejudice, your Honor.

THE COURT: Okay.

MR. NATHAN: With respect to being the banker, the insurer and the owner of the litigation, but for these unethical provisions, the lawsuit would not be brought. Second, with respect to the fee splitting with lay-investigators who may be witnesses or prepare witnesses, there is no doubt in the world that that will taint the trial and the truth-finding process at trial.

So with respect to the taint, I say it is both

bringing the lawsuit, making these scurrilous allegations which have resulted in tremendous adverse publicity for these clients, in a case that should not have been brought because it was brought unethically, and that the trial process is going to be tainted by the absolutely illegal arrangement to split the fees and to pay fact witnesses on a contingent basis, depending on the result that their testimony may secure in the case.

THE COURT: Let's put that second one aside because that has nothing really to do directly with counsel, does it?

MR. NATHAN: Absolutely. It is counsel that is providing the fee splitting, your Honor.

THE COURT: You call it fee splitting. There is a separate agreement --

MR. NATHAN: Signed the same day in every case, with the same paragraphs, the same provisions and the same interrelation, which is the lawyers pay the investigators as they go. The Departments never have any responsibility to pay the investigators. The investigators have no responsibility to take any instructions or make any reports to the Departments. At the end of the day, the lawyers get 15% and the investigators get 3%.

If you can just structure fee splitting in a way that says okay, I'm going to put in a different contract on

the same day and I'm going to make it directly from the client instead of from the lawyer, and that's as easy as you can evade the ethical responsibility of not splitting fees with lawyers, then there's no point in having the provision. Anybody can figure that out, to do fee splitting on the same day with the same arrangement, on the same contracts and make it into a three-part deal instead of a two-part deal.

THE COURT: Why does that taint the process? It's not the fee splitting that taints the process, is it? It's the fact that the investigators have a contingent fee arrangement.

MR. NATHAN: That's right, I agree with that. It is fee splitting by the lawyer, which is not supposed to happen.

THE COURT: I'll grant you for the sake of argument -- let's call it fee splitting. But that's not what taints the process and that's not even a violation --

MR. NATHAN: Fee splitting is a violation of the ethical rules.

THE COURT: Fee splitting is a violation but I don't think I've ever seen a case where fee splitting led to disqualification of counsel, nor have I ever seen a case where fee splitting -- the other remedy you want is to dismiss the complaint and I've never seen that.

MR. NATHAN: I agree.

THE COURT: It seems to me that whatever taint -- the taint that you cite, at least in the papers, is the inducement to fabricate evidence, but that flows from the contingent fee arrangement.

MR. NATHAN: That's right.

THE COURT: But even if it weren't a contingent fee arrangement, it seems to me that there's always that potential in an investigator's work. Investigators know who pays their bills and they know what the point is.

MR. NATHAN: Your Honor, I don't really follow you because if a fact witness were to be getting paid, even just get getting paid for his testimony would be a criminal violation.

THE COURT: Sure.

MR. NATHAN: And if the fact witness is going to benefit from his testimony --

THE COURT: But that hasn't happened yet. We don't know that.

MR. NATHAN: We're talking about what may taint the proceeding. If you have an agreement in advance with investigators who are A, going to prepare witnesses, and B, perhaps be witnesses themselves, and they have a financial stake in how big the verdict is and they're going to get a percentage of that verdict, then you can't be very confident of the fact-finding process during the entire process of the

case, not only at the trial but in depositions, in documents that appear, in arguments that are made. That is a very significant potential taint.

THE COURT: Wouldn't that same taint come from lawyers who represent people on a contingent fee basis?

MR. NATHAN: No, because A, they're not going to be witnesses. They will be advocates, not witnesses. And B, that is permitted because lawyers are regulated and have ethical standards to meet, whereas the laypeople who are hired here have no -- there is no control over them. There is nobody looking over their shoulder. They're not under anybody's control. That's why you're particularly not supposed to split fees with investigators. In the commentary it says that's exactly why lawyers are not supposed to split fees with investigators, because they may tamper with the evidence.

THE COURT: What commentary is that?

MR. NATHAN: It's in our brief, your Honor. Your Honor, let me please, if you will, go back to a point about bringing the lawsuit, because it's very critical and I think it's important. It's important that you look at this from the perspective of who these plaintiffs are and what traditions they come out of, to understand that but for these provisions about being the banker and the insurer, that this lawsuit would not have been brought.

The plaintiffs are these Departments that, according to the plaintiffs' own words, are financially strapped. They have no money. That's why their plaintiffs in this case; they have no money.

THE COURT: That's not unusual. A lot of plaintiffs that come into this Court -- that's why they get contingent fee arrangements.

MR. NATHAN: Right. But they don't get insurance that says, you will never have to pay a penny for this case, even in judgments against you. Please, your Honor, hear me out.

With respect to the Colombians, they come from a system in which the losing plaintiff pays the defendant's legal fees. These Departments know that these allegations and these proceedings are going to be quite protracted and expensive. There is going to be significant legal expense by the defendants in this action.

They have no idea, and I'll explain why, whether there's any merit to these claims or not. They are clearly worried that if they proceed and there's a loss, even where their lawyers are paying all of the expenses along the way, when the case is over, they will have a gigantic bill to pay to the other side. That is under their system.

What's critical to understand here, your Honor, is there's not a single one of these Departments that was

willing to authorize this lawsuit before getting that indemnification with respect to the lawyers' fees on the other side, the prevailing defendants' fees, and getting these counterclaims, which I'll get to in a minute.

Because the facts are that come from the plaintiffs' papers and their documents that some of these Departments entered into retainer agreements in July and August of 1999 that did not have those indemnification provisions. Then in late July of 1999, a constitutional court in Colombia entered a decision that said governmental entities that bring suits and lose have the obligation to pay the winning party's legal fees.

Thereafter, within a week of that, on August 6th, there was a meeting -- this all comes from the plaintiffs' papers -- in which they say the topic came up and we entered into arrangements to make sure that number one, if they lost and there were legal fees from the defendants, they would be paid for by the plaintiffs' lawyers. And two, if there were any counterclaims, paid by the lawyers, and those Departments that had already entered into retainer agreements insisted on having addenda to their agreements providing for exactly this relief.

THE COURT: It sounds to me like it wasn't the lawyers that were inducing them. They were inducing the lawyers to agree to indemnify them.

MR. NATHAN: Right, I agree with that.

THE COURT: Doesn't the Champerty Statute prevent the lawyer from running around to stir up litigation by saying, I'll do all these things for you if you just sign up with me and I'll take the case.

MR. NATHAN: Exactly.

THE COURT: It was actually the reverse because they already wanted to bring the case and they said, wait a minute, we may have something. If you want to take this case, you're going to have to indemnify us. It's almost the reverse.

MR. NATHAN: You're exactly right but it is champerty, because what champerty provides is a lawyer cannot give something to the client in order to bring the lawsuit. If what you're saying is right, your Honor, and that's exactly what I'm telling you, that if the clients were not willing to bring the lawsuit because --

THE COURT: They were willing to bring the lawsuit. They were the ones that hired the lawyers to bring the lawsuit. Then after the fact they said, wait a minute, I'd like to bargain for some additional protection.

MR. NATHAN: Right.

THE COURT: And let me see if I can get the lawyers to give me that protection.

MR. NATHAN: Right.

THE COURT: So it wasn't the lawyers stirring up litigation, it was the Departments stirring up litigation. They had every intention of pursuing this and they went to the lawyers to get a good deal.

MR. NATHAN: With respect to who started this litigation, I don't agree with your assessment.

THE COURT: That's what you're arguing. That's what you just told me.

MR. NATHAN: What I'm telling your Honor is the lawyers came to the Departments originally, back in May or before, and came with a lawsuit, and I'll show you the provision that proves that is the case, which is provision 11 of the agreement, which I'd really like to turn to in a minute.

But with respect to the decision to sue, based on what they told the clients, who had -- as I put it in our papers, your Honor, they came to them and said, here's a situation in which you don't even have to pay for the lottery ticket. We pay all the expenses. If we win, we give you 80% but we deduct our expenses and you get 80%. Who wouldn't take that deal, when there's no obligation. So they take the deal. The lawyers start it up but then, you're quite right, the plaintiffs have second thoughts.

THE COURT: But that would have been okay in Louisiana. You don't dispute that. Under Louisiana Law,

that would be okay.

MR. NATHAN: No, I do dispute that. In Louisiana, your Honor, it is okay for the lawyers to pay the expenses and not look to the clients to be reimbursed. But under the Edwins case, it is not permissible for that to be the inducement to bring the lawsuit. That was the inducement to bring the lawsuit, the guarantee that there's no obligation and no fees to be paid.

But then what's really important is what you have said, which is that plaintiffs, the Departments get cold feet and they say in light of these rulings and the fact that we may be exposed to the expenses and the lawyers' fees for the other side and a counterclaim, we're not going to go ahead with the suit unless you give us an insurance policy. Giving an insurance by the lawyers is champerty. That is giving something of value in order to get the plaintiff, a reluctant plaintiff, to bring the lawsuit.

Let me turn now to what I think is the most important provision.

THE COURT: But everything still ultimately flows from your argument that you're prejudiced because there is a lawsuit. So you're asking me to extend -- because I've not had a single case cited to me yet in the Second Circuit that said that a lawyer ought to be disqualified because of a champertous relationship or whatever you want to call it.

MR. NATHAN: There have been cases in which the lawyer has been disqualified because of the proprietary interest in the litigation. Let me turn to that.

THE COURT: Let's turn to that.

MR. NATHAN: Look at paragraph of the Boyaca agreement, which appears at section D under the Craig Stewart declaration, and look at paragraph 11, which is an absolute admission. Look at the first sentence of paragraph 11. It says, "The client acknowledges and agrees that the information provided under reserve to the client by the attorneys is the result of the work of the attorneys and" -- here is the most important language -- "is the property of the attorneys." The information necessary to bring this action is the property, is owned by the lawyers and shall be owned.

THE COURT: The next paragraph is the reverse. Every attorney's work product is protected in the State of New York. You have a lien on all your papers if a client decides to discharge you. The confidentiality of information agreement can be read no more broadly than that.

MR. NATHAN: This is of information. This is not of work product. This is facts. Your Honor, let me see if I can give you an analogy.

THE COURT: It says that the information provided by the attorneys is the result of the work of the attorney

and is the property of the attorneys. So if the attorneys have developed information, that's their property. Conversely, whatever property belongs to the client is the client's property.

MR. NATHAN: The rule we operate under in this District in New York and that was adopted by this District is that the lawyers may not have a proprietary interest in the lawsuit or the subject matter of the lawsuit.

THE COURT: This doesn't say that. All it says is any information provided by the attorneys is the attorneys'. If it came from the attorneys, it's the attorneys'. It doesn't establish a propriety interest in the lawsuit.

MR. NATHAN: It establishes a proprietary interest not only in the lawsuit but in the subject matter of the suit. If I can give you an analogy which is exactly what I think we're dealing with here, these lawyers -- I know that in the last few months lock boxes have not done well in this Court but let me give you an example.

THE COURT: You're alluding to something I'm not familiar with.

MR. NATHAN: I analogize this, your Honor, to a situation in which there's an action for a plevin over a safe-deposit box at a bank. The lawyer goes to a client and says, I'm going to bring a lawsuit in your name for access to the lock box and everything that's in it because I'm

telling you there's a lot of riches in that lock box. The way we're going to prove that you own the lock box is because I have the key to the lock box.

You get 80% of what we find in there, minus the expenses that we have, but I the lawyer own the key. I have the information, which says, your Honor, I've got a proprietary interest in this and if you fire me, if you dismiss me as the lawyer from the case, you can go forward with the case but you don't have the information to win the case because you're not going to have the key.

THE COURT: Isn't that always the case?

MR. NATHAN: That's never the case, your Honor.

THE COURT: Sure it is. A lawyer goes out -- a lawyer is hired by a personal injury victim and starts working on the case, does an investigation, gathers documents from various sources, puts them into his file. That becomes the information in his file. The client says, I'm going to another lawyer; give me my file. He says no, you've got to pay me. He's got every right to do that. He doesn't have to turn over any of that information unless the client pays him.

MR. NATHAN: I don't know what work product is there in that regard, but I will tell you that in my experience, your Honor, I think what the rules contemplate is that the client has the information and gives the

information to the lawyer, who has --

THE COURT: That's what the second paragraph says. To the extent that that's true, the second paragraph covers it. If the client gives that to the attorneys, it remains the client's and the attorney is not permitted to divulge it.

MR. NATHAN: The attorney is not permitted to do that, your Honor, by the ethical rules. This is a sham argument that this is reciprocity. The lawyer has a preexisting legal obligation not to disclose any information he gets from the client. He doesn't need to give reciprocity to have the client do it. What they're doing, your Honor --

THE COURT: I don't know that it goes that broadly, but I'll --

MR. NATHAN: Any information that is provided in confidence by a client --

THE COURT: That's the key.

MR. NATHAN: Of course.

THE COURT: There's plenty of information -- I see what you're saying. It covers only --

MR. NATHAN: Information provided in confidence.

THE COURT: Under the reserve of the client, whatever that means.

MR. NATHAN: Whatever that means. I don't know

what reserve means. But what I say to your Honor is the lawyers have an obligation to keep the information they got from their client confidential. I have that obligation and so does every other lawyer in this District and basically in this country. In return for that, you don't have obligations on the client to keep confidential -- given your example, your Honor, of the work product, I agree with you about paying the legal fees. But when you pay for that, that is the client's property and the client can do anything it wants with that property. It can disclose it in the New York Times or bring it to another lawyer.

THE COURT: That's not the lawsuit, that's not the action.

MR. NATHAN: I'm sorry?

THE COURT: That's not the action. That's information but it's not the lawsuit. The claim is something separate, isn't it?

MR. NATHAN: No, I don't think so, your Honor. Maybe it is that we're going to need the discovery that you suggest because I submit to you that I could demonstrate, upon showing you the documents and testimony, that what happened here is, without any question, that these Departments had no clue about any of this matter, that they have no information about it in their own files and no interest and never evinced any interest, that these lawyers

went and sold them and said to them, we and our investigators have some critical information for you that will make a --

THE COURT: You mean the lawyers and the investigators --

MR. NATHAN: Together.

THE COURT: -- found out information that they could sell to the clients.

MR. NATHAN: Exactly. They provide the information but they say, you can't use this information; it's our information, it's our property. What we want from you is we want your name. We want to bring this lawsuit for our benefit. You know nothing about it. You will never have a payment to make. You will never be held responsible. Again, let me come back to that. You say there's not going to be a lawsuit. What you're not appreciating is --

THE COURT: I'm sorry, I said what?

MR. NATHAN: You said that there won't be this counterclaim so there's not much to worry about. But what I'm telling your Honor is we're dealing with Colombians under the Colombian law. In Colombia, the law is that allegations in a complaint which are scurrilous can lead to claims for defamation and for abuse of process and other claims if you lose. You will pay not only the expenses of the other side in losing but also pay damages.

THE COURT: So in other words, your client could go to Colombia and sue the Departments for defamation.

MR. NATHAN: Exactly. It's not a question of whether that's likely to happen. The question is, what's in the minds of the Departments when they are entering into this deal, because without a promise that violates the ethical rules and the laws of champerty, they wouldn't have brought the lawsuit because they were worried about that possibility.

For example, let me just tell you -- I find this incredibly offensive in the documents of the plaintiffs. We put in an affidavit of a Colombian lawyer who says that as a matter of civil law in Colombia, it is possible to bring a counterclaim or a separate suit for damages for scurrilous allegations in the complaint. They come back in a response and have an affidavit from a lawyer who says you cannot bring a criminal charge based on the allegations in the civil complaint. That's all he says; you can't bring a criminal case.

Then in their papers, they characterize this affidavit as saying that there couldn't be a civil case for damages in Colombia; see the affidavit of our expert, who only says there couldn't be a criminal case. That's the kind of sharp practices we're dealing with here repeatedly in this matter.

Your Honor, the fact that it is cited three times in the limited agreement that the costs will never be paid, no costs of any kind will be paid and we have the indemnification --

THE COURT: As I understand it, that's not a violation of Louisiana Law.

MR. NATHAN: First of all, Louisiana Law I thought we agreed in the beginning does not apply here because it is absolutely --

THE COURT: Forget about what I said at the beginning. Louisiana Law governs the contract.

MR. NATHAN: I don't think so, your Honor. Let's talk about Louisiana Law.

THE COURT: No. Let me ask you to answer my question.

MR. NATHAN: It is not permitted under Louisiana Law. That's the answer to the question.

THE COURT: You don't have to tarry on Louisiana Law any more than that.

MR. NATHAN: It's not permitted. Let me talk about Louisiana Law because I think it's really important. Your Honor, may I just say this one thing?

THE COURT: Say one thing.

MR. NATHAN: There are two things that need to be said about --

THE COURT: You said you were only going to say one thing.

MR. NATHAN: I'm only going to say one thing about Louisiana. As to Louisiana Law, that is a clear demonstration that these lawyers knew this was a violation of the rules of this Court and of this jurisdiction. In May of 1999, the plaintiffs' representatives announced that this lawsuit was going to be in New York. They were going to bring the lawsuit in New York. That is before any agreement was signed by any of these Departments. So they knew that this was a lawsuit intended for New York. They knew what the rules of New York were and they put in Louisiana for no reason other than to try to evade these rules in New York.

They didn't succeed because Louisiana Law does not permit it, because they certainly don't permit, number one, having proprietary interest in the lawsuit and they don't permit having indemnification or insurance agreements agreeing to indemnify for costs and sanctions, as is clearly inappropriate in Louisiana, unethical and not permitted. With respect to the payment of all the costs, you can pay all the costs in Louisiana and not look to the plaintiff for the recovery but you cannot use that to induce the lawsuit. That's what the Edwins case says in Louisiana.

The second thing I want to talk about, your Honor, is the --

THE COURT: The Edwins case?

MR. NATHAN: The Edwins case is a case in Louisiana Supreme Court, in which it says that you cannot --

THE COURT: When was that decided?

MR. NATHAN: In the 1980s. It's in our brief, your Honor. I also want to talk, if I can, your Honor, about Speiser, Krause, to say one word about this. This lawsuit was intended for New York. That's what the plaintiffs announced in May of '99. The plaintiffs knew that they would need New York counsel.

THE CLERK: You can't drop your voice like that. You have to keep your voice up.

MR. NATHAN: I'll do my best.

They knew that this was going to be brought in New York. They knew they had to have New York counsel.

THE COURT: Why is that?

MR. NATHAN: To have local counsel in New York?

THE COURT: You're saying they.

MR. NATHAN: The plaintiffs' lawyers knew that there had to be New York counsel involved in a case that was intended for New York. I submit to you it is not an accident that the New York lawyers did not sign these retainer agreements. They didn't sign any one, so far as I can tell, of 26 agreements here. To suggest that they weren't aware of what the provisions were in the retainer

agreement boggles the mind and stretches credulity. I suggest to you they knew what was in that agreement and that they deliberately eschewed signing the agreement because it would violate the ethics rules.

Your Honor, if this Court is going to enforce its rules, it cannot be the case --

THE COURT: Its rules.

MR. NATHAN: These are the Court's rules. The District Court has adopted as its rules the rules of New York Code of Professional Responsibility for those who practice before this Court. It's enforced by the Committee on Grievances, which if you violate those rules, you can be disbarred from practicing in this District, you can be suspended, you can have other sanctions applied.

In my opinion, based on the Second Circuit law, if there are ethical violations, serious ethical violations, not simply technicalities, not simply appearance questions, but egregious and serial ethical violations that go to the heart of the representation, then the District Court, the trial court has an obligation to deal with those violations in the context of the litigation and should do so at the earliest time so as to avoid problems that may be created by a lengthy proceeding before the Committee on Grievances.

Where the lawyers have undertaken to sell a lawsuit and to serve as the banker, the insurer, the owner,

the real party in interest in the lawsuit, where under the provisions of the retainer agreement, the client has no responsibility, no obligations, which subverts the entire system that we have, where clients have to be responsible for their counsel and where they can be sanctioned under Rule 11 and other rules --

THE COURT: I didn't get that. There is no ethical violation there, is there?

MR. NATHAN: Absolutely there is.

THE COURT: How is that?

MR. NATHAN: First of all, if the lawyer is the owner of the litigation --

THE COURT: Put aside the owner of the litigation.

MR. NATHAN: If the client has no responsibility in the litigation and the lawyer is responsible for all of the client's actions, there is no way to sanction the client in that respect.

THE COURT: Why can't the client say, I'm going to turn over to you all decision-making with respect to this case?

MR. NATHAN: If a client --

THE COURT: I'm asking you, why can't they? Is there any disciplinary rule that says they can't do that.

MR. NATHAN: I don't have a disciplinary rule, your Honor, but the entire system -- let me give you an

example.

THE COURT: You want me to disqualify these guys because of some generalized notions that a client can't turn over to his attorney decision-making authority.

MR. NATHAN: That isn't our only ground.

THE COURT: I guess you're saying that shows how much the lawyers own the lawsuit.

MR. NATHAN: Exactly.

THE COURT: All right.

MR. NATHAN: And how this Court will not be able to control it. Suppose, for example, the clients destroy all the documents.

THE COURT: I don't follow that. I think I understand your position.

MR. ROLFE: Your Honor, I yielded to Mr. Nathan. Could I take back five minutes to answer some of your Honor's questions?

THE COURT: All right.

MR. NATHAN: Thank you.

MR. ROLFE: Obviously, your Honor, I can see that it's an uphill battle, but I do want to point to matters in the brief.

THE COURT: Okay.

MR. ROLFE: Pages 29 and 30 of our reply brief cite to your Honor's cases that disqualify lawyers without a

discussion of tainting at trial. There are Southern District, there are Eastern District cases. There's also a case in the state court --

THE COURT: Tell me specifically which ones you're talking about.

MR. ROLFE: I'm talking about the Peggy Walls against Liz Wayne (ph) case, which is a 1996 case.

THE COURT: That was Judge Haight's (ph) case.

MR. ROLFE: That was Judge Haight's case.

THE COURT: That was the one where he had a half interest in the case. I remember that.

MR. ROLFE: That's right.

THE COURT: I understand that the concept of a proprietary interest --

MR. ROLFE: Is precisely the same.

THE COURT: The facts are different but I think I get your argument. You're saying that the plaintiffs' lawyers have such a hold on the case that in essence they own it.

MR. ROLFE: Because they have indemnified -- this is the other point. We cite Judge Keenan's (ph) case as well, the Norma Brothers (ph) case. That's also on page 29. Your Honor asked for a Second Circuit case and you may brush aside this as dictum in Fleischer against Philips (ph), Second Circuit 1959 cited on page 30, but that's the only

case in the Circuit that says that champertous conduct most certainly would have resulted in counsel's disqualification.

There is no case after Armstrong, there is no case after Bottaro that says that that case is wrong and that somehow champerty is different because it affects things that are different from the trial. If this is allowed to persist without any modification of the contract, without disqualification, we open the gates to champerty because you can't analyze champerty as a question of trial taint. You have to look at the other things in the contract.

THE COURT: What you're saying is you want me to add to Armstrong and Macalpins' series of considerations champerty.

MR. ROLFE: I want your Honor to focus on how those cases arose. They arose out of Cannon Nine, which is the appearance of impropriety. As your Honor knows, there were a lot of cases that all of a sudden, in a knee-jerk way, for tactical reasons, lawyers tried to disqualify and said there's an appearance here or for highly technical reasons. Armstrong nipped that. Armstrong said, you can't do that. You've got to show prejudice.

THE COURT: I'm with you.

MR. ROLFE: What we're saying here is the prejudice is A, that the case wouldn't have been brought, B, that there's an inherent conflict. I answer the question

your Honor asked Mr. Nathan. There is a conflict between lawyers and their own clients in the following respect. The lawyers have indemnified against a suit in Colombia. By the way, one of the clients whom I represent, which has a jurisdictional motion in this Court but does business in Colombia and has been accused of money laundering in this complaint and could very well file a lawsuit in Colombia for libel, for slander, trade libel against the Departments, the lawyers have indemnified those damages. They have agreed to defend at their expense such a suit.

Let me give you a hypothetical. Six months, a year down the road, let's assume that the judge incorrectly decides not to dismiss this case and there's a settlement offer put on the table and it's a very low settlement offer, but it says to the lawyers, gentlemen, we are prepared to drop our lawsuit in Colombia if you accept our settlement offer. The lawyers may very well think this is a real good deal here because we get out from under the problem in Colombia.

Contrariwise, there is a big offer but it doesn't let the lawyers out of the suit in Colombia and the lawyers say to their clients, this is not a good enough offer. You've got to get out from under the suit in Colombia. The reason that that's a problem is because there's a conflict. There's a direct conflict between the interests of the

lawyer and the interests of the client. That exists right now. That doesn't just exist if a suit is brought. That exists right now.

THE COURT: Can you explain that to me? Why does it exist right now?

MR. ROLFE: Because you can't wait six months and say, when the process of this case has run its course, now that you've brought a lawsuit, there's a client. I'd file tomorrow. Then they'd be put in a problem.

THE COURT: That may be so but it hasn't happened yet. Maybe you need to go file that lawsuit.

MR. ROLFE: Because if we're predicting what could happen at a trial, we have to predict, will these investigators testify, is there testimony tainted by their contingent fee. The cases say absolutely yes. Ted Friedman was disbarred for, among other things, sharing his fees with an investigator. New York State Bar opinion 679 makes it very clear why you can't do that.

The fact that it's in two separate agreements and the fact that the money flows through the client doesn't remove the problem, because the problem is the incentive on the investigators to lie, the incentive on the investigators to prepare witnesses in such a way as to shade the truth, and that's not acceptable in New York. It's not acceptable under New York standards and it is a taint of the process

and a taint of the trial.

THE COURT: Again, that flows from the contingent fee arrangement.

MR. ROLFE: You can't just narrowly say the contingent fee arrangement, without looking at the fact that the contracts are virtually identical. The words are the same. These lawyers drafted them. These lawyers negotiated them. If they had been put in one contract, your Honor wouldn't have had any difficulty.

THE COURT: Right, but I don't know that that necessarily would have meant a finding of trial taint.

MR. ROLFE: I think, your Honor, I can't do any more than to explain that the commentary on DR-3102 makes it very clear that the lawyers could not give this money directly to the investigators. Are we agreed on that?

THE COURT: I believe that they couldn't if they -- they could certainly pay investigators.

MR. ROLFE: Yes, but they can't give them a stake.

THE COURT: They can't pay the investigators a percentage of their own fee based on whether or not they win or lose. I know what you're trying to say. You're trying to say this is actually a 21% fee --

MR. ROLFE: 18%.

THE COURT: 18% for the lawyers and 3% --

MR. ROLFE: 15% for them, 3% for the others.

THE COURT: 18%.

MR. ROLFE: I'm saying it's matter of ledger domain. It's a matter of how it's structured and it was structured in order to avoid the very problem that we now face, and you can't do that. What if I said to your Honor the choice of law in my contract is Colombia because Colombia has no ethical standards at all and everything I agree to in this contract is permissible. Your Honor wouldn't stand for that one minute.

I tell your Honor that Louisiana is much more removed from the facts and the allegations in this case than Colombia because the lawyer whose firm is there isn't even licensed to practice in Colombia. The firm was established in 1998.

THE COURT: Isn't licensed to practice in Colombia?

MR. ROLFE: I'm sorry, in Louisiana.

THE COURT: I wouldn't have expected him to be.

MR. ROLFE: He's not licensed to practice in Louisiana. You can't choose your ethical rules. As to Edwins, which is the only case that goes as far as to permit a lawyer to guarantee the payment of costs --

THE COURT: I thought that that's part of their disciplinary rules.

MR. ROLFE: It is but it's after Edwins, I

believe, your Honor.

THE COURT: That's why I'm not sure that Edwins is particularly good law.

MR. ROLFE: The importance of it is that what Edwins says is you can't do that if you're going to induce the client.

THE COURT: But then they adopted another -- how could it not be something that induces the client?

MR. ROLFE: That's the point, your Honor.

THE COURT: So they adopted a Bar regulation or a disciplinary rule that says it's okay. We're going to forget the sham the New York practices in this regard.

MR. ROLFE: The facts of Edwins are that this impoverished fellow brings a lawsuit and after the relationship is entered into, he needs money to live on. The court in Edwins says, how is he going to prosecute his lawsuit unless these lawyers give him money to live on and they say that's okay. What Edwins says is that's okay, except if A, it was an inducement, which it wasn't in that case, or B, that was given before the relationship began. We know in the Boyaca agreement that those provisions were in the first contract, not an addendum.

THE COURT: The expenses.

MR. ROLFE: All of that stuff, expenses, indemnification.

THE COURT: Indemnification was in the beginning?

MR. ROLFE: Yes, in Boyaca, because Boyaca is signed in October, so that's negotiated before that agreement is entered into. It's not after the relationship began.

THE COURT: But the others were entered into before, weren't they?

MR. ROLFE: Your Honor, we know of three contracts. That's all that's in this record. If there are some that are different, then the plaintiffs ought to come forward and they ought to make part of the record those contracts.

THE COURT: All right.

MR. ROLFE: With respect to the work product, your Honor says that the lawyer has a right to hold on to his work product. I used to think so, too, but I read the Sage Realty against Proskauer, Rose case, 91 N.Y. 2d 30, jump cite 36, 1997, that orders the lawyer to give his work product to the client after the lawyer and the client split up. I'm not sure whether it was held hostage for the payment of any fees but that isn't the relevant point. What the Sage Realty case says is that the work product done on behalf of a client is the client's. It's like a work for hire doctrine.

THE COURT: I don't know where -- did that come up

in the context of a lawyer asserting his lien on his files?

MR. ROLFE: The lawyer said, I don't have to give you my work product and the court said, yes, you do, because it's the clients, it's not the lawyer's.

THE COURT: The client pays for it, you mean.

MR. ROLFE: I cannot tell your Honor that the question of payment was in that case.

THE COURT: I can't imagine it wasn't.

MR. ROLFE: But the principle has to do with who's got the right. This is not a matter of payment in these contracts. This is a matter of who's got the right.

THE COURT: It's a matter of who's got the right but you can bargain away rights.

MR. ROLFE: You can't bargain away; that's the point.

THE COURT: Why can't you?

MR. ROLFE: Because the ethical rules of this State don't permit you to do that.

THE COURT: To bargain away who gets to possess what information?

MR. ROLFE: No, your Honor.

THE COURT: There's nothing in the ethical rules that says you can't do that.

MR. ROLFE: Your Honor, the Proskauer people wanted to keep their work product.

THE COURT: That's a court order that says you can't do it. They didn't rely on an ethical rule to say that or a disciplinary rule.

MR. ROLFE: We have a situation --

THE COURT: If the client had agreed up front that all the work product would be the attorney's, there's no reason why a court should jump in and say, you can't do that.

MR. ROLFE: Your Honor, I think it impedes the ability of the client to fire his lawyer.

THE COURT: Sure.

MR. ROLFE: And that, the courts have said, like non-refundable retainers -- there's no reason a lawyer and a client --

THE COURT: I think we're going way off the track with this.

MR. ROLFE: No, we're not, because you're talking about bargaining and there are certain things you may not bargain for if you're a lawyer because you're bound by --

THE COURT: There's no disciplinary rule that I know of that says you can't bargain for that.

MR. ROLFE: Your Honor, there are plenty --

THE COURT: Let's not argue about that. If you can't cite it to me, I'm happy to see it.

MR. ROLFE: Your Honor, it talks about ownership

of a lawsuit, it talks about joint venturing, it talks about proprietary interest. All of those are forbidden. They're forbidden in New York, they're forbidden in Louisiana, they're forbidden in every state in this country.

THE COURT: All right.

MR. ROLFE: So to say you can bargain that away --

THE COURT: Bargain what away?

MR. ROLFE: You can give up your rights; that is, the lawyers can take over everything and you can yield to the lawyers. You may do that as a client but lawyers are not permitted to do that as lawyers.

THE COURT: You're talking about whether they can give away the claim. That's something different, it seems to me, from information.

MR. ROLFE: I don't think it is because I think if we had discovery, we would demonstrate that the only way the Departments could bring this claim --

THE COURT: That's different. Everybody has to have information to bring a claim.

MR. ROLFE: But usually it's the client's information.

THE COURT: Maybe the client has a little bit of information and then the lawyer develops a whole lot of other information. Maybe the lawyer in this case, unlike securities cases, the lawyer develops information in advance

and finds a plaintiff, but this plaintiff was out there, very easy to see. I understand your argument. The Champerty Statute limits the ability of an attorney to promise or give a valuable consideration as an inducement to place it.

MR. ROLFE: Right.

THE COURT: I've got it.

MR. ROLFE: Judiciary Law 488.

THE COURT: Who is going to talk?

MR. MALONE: Your Honor, we are both eager to leap up and speak.

THE COURT: You can start off by telling me, what relationship does that Louisiana firm have to anything here? How did they get involved in this case?

MR. MALONE: Your Honor, the case -- first of all, your Honor pointed out something that's very, very important here.

THE COURT: I want an answer to my question. I don't see anybody here from that firm here today.

MR. MALONE: They brought the case to us, your Honor, originally, but the point I'm making --

THE COURT: Did they bring the case to you?

MR. MALONE: Yes, but here's the point I'm making, your Honor, and this is very important. You point out a very important point here. We are very much handcuffed by

privilege obligations to our clients and specific confidentiality agreements with our clients that make it very difficult for us to defend ourselves in what is basically an open court proceeding. I'm going to answer the Court's questions but I want the Court to understand that if we were allowed to lay out everything like we'd like to, believe me, there would be a lot more.

But to answer your question, and this is an example of something I should not have to get into, the Louisiana law firm brought to me the European community as a client. That's their role. How we got to be representing Colombia -- again, these defendants should not know any of this, Judge, but I've got to defend myself here and I'm going to do it.

THE COURT: Somehow these retainer agreements came out and you've got to admit, they have some pretty unusual provisions. They're not provisions that I've ever seen before, at least the indemnification provision and --

MR. MALONE: Your Honor, I'll be happy to answer any of --

THE COURT: But in any event, the Louisiana Law -- one of the things that is of interest to me and I guess one of the things that to my mind protects the contract, the retainer agreement here is the fact that under Louisiana Law, most if not all of those provisions are at least

arguably allowed.

MR. MALONE: That's correct.

THE COURT: But it bothers me, frankly, that it does appear that the only reason that this agreement was bargained for under Louisiana Law was because that's the law that permitted this. Otherwise, you couldn't have gotten -- in other words, Louisiana has no contact with this case, no real contact with this case.

MR. MALONE: Your Honor, let me explain, and this is the sort of leaping to conclusions that the defendants have done continually today and in these arguments because they don't know, because they don't want to know.

The Sachs & Smith (ph) firm referred or was the firm that first brought to my attention the case of the European community and as you know, we represent the European community. What actually happened in this thing, completely contrary to their interpretation of the facts, is we were investigating this matter for the European community for about a year. During that year --

THE COURT: As a result of Sachs & Smith bringing to you information?

MR. MALONE: No. Your Honor, it's such a long story. Again, your Honor, I'm breaching privileges on behalf of the European community, who is not even here today. But the Sachs & Smith firm was responsible for me --

THE COURT: You don't have to. I'm not asking you to do that. I don't want you to breach any privilege.

MR. MALONE: Let me just explain as best I can without breaching privilege. We were investigating this matter for the European community. At the same time, the Departments of Colombia and Berg (ph) Associates were preparing a case of their own. I didn't know about them, I didn't care about them. It wasn't until they had been on this for about a year and I was on the European community case for a period of time --

THE COURT: Did you have any involvement with Berg Associates at that time?

MR. MALONE: Never heard of them. My investigators were working with me on the European community case, found out that Berg was working on the same case for the Colombians. That's what caused us to have dialogue with the Colombians, because we realized that two different groups were looking at the same case. So all this thing that we came up with this and we went to these people and we sold them on this is complete and utter hogwash, your Honor.

THE COURT: So you didn't do that and the Sachs firm came to you with Berg.

MR. MALONE: No, the Sachs firm never heard of Berg either, your Honor. The Sachs & Smith firm was co-counsel with me on the European community matter. My

investigators, in the course of their investigation, became aware that Berg was investigating the same thing for the Colombians. That's how we came in contact with the Colombians.

THE COURT: Then Louisiana Law was chosen specifically because it allowed you -- not allowed you but allowed -- well, I guess it did allow you. You were involved in the negotiation of the retainer agreements with the Colombians.

MR. MALONE: We became involved in negotiating with the Colombians at the very end of 1998, like around December. The first meeting I recall was March of '99 but they were already working with Berg long before I came into the picture. Your Honor, just so you understand, and I think this is important --

THE COURT: The bottom line is that Louisiana was chosen as the forum under which this contract was going to be determined precisely so that you could take advantage of those provisions that permit the kind of expenses and whatnot.

MR. MALONE: No, your Honor. At the time these contracts were initially discussed, there were only two law firms involved in this, Krupnick, Campbell, a Florida law firm, and Sachs & Smith, a Louisiana law firm. When we originally approached the clients, they had two choices,

Louisiana Law or Florida Law, because those were the only two law firms involved.

Speiser, Krause didn't come into this until long after that and I particularly resent Mr. Nathan making the completely unsupported conclusion that Speiser, Krause specifically avoided signing these contracts in the summer of 1999. That's rank speculation on his part which is completely untrue. Speiser, Krause had nothing to do with this in the summer of 1999.

What happened was we presented the client the two options, Louisiana Law or Florida Law. The clients overwhelmingly -- they essentially demanded Louisiana Law because it's a civil law jurisdiction. The law is similar to Colombian Law, much more similar than the common law of the State of Florida, and that's why they wanted it, because it was a species of law which they understood. Your Honor, that's put forth in our papers, by the way.

THE COURT: How did they get to Sachs? I thought you said they got to that Sachs firm through you.

MR. MALONE: What happened, your Honor, is at the point that we began discussing the matter with the Colombians, Sachs & Smith and Krupnick, Campbell were co-counsel in working up the case of the European community. So when we had our discussions with the Colombians, the two firms together had those discussions.

THE COURT: So you're saying Krupnick and Sachs were both involved in the European community case as well.

MR. MALONE: Correct.

THE COURT: And Berg brought the case to --

MR. MALONE: Berg didn't bring anything to anybody, your Honor. What happened my investigators working on the European community case became aware that Berg was conducting an investigation for the Colombians. At that point they said, we ought to be coordinating.

THE COURT: They who, the investigators?

MR. MALONE: The investigators. At that point, all the issue was was coordination. It wasn't until a number of months later that I made the determination that it would be advantageous for the Colombians to be represented by us as well and that's how this evolved, completely unlike the way the defendants speculate.

THE COURT: But you never signed on to the retainer agreement.

MR. MALONE: Yes, I did. I'm Krupnick, Campbell, your Honor.

THE COURT: I was operating under the misimpression that you were with Speiser.

MR. MALONE: Then I've confused you.

THE COURT: You have. Now it's coming a little clearer.

MR. MALONE: The point I'm making, your Honor, is that Krupnick, Campbell and Sachs & Smith were representing -- we hadn't formally been hired at that point but we were working for the European community on this. When we became aware that Berg was investigating the same thing for the Colombians, we started a dialogue of cooperation. I really shouldn't get into this, either.

THE COURT: You don't have to get into the details. I don't want you to violate any privilege.

MR. MALONE: I can't say more than that. The bottom line is, your Honor, the Colombian Departments had already spent a lot of time on this before I came into the picture. Let me just show you how clearly it is that the defendants know that, if I may approach the bench for just one moment.

THE COURT: I'm not really interested in how much the defendants know. What I'm interested in is I'm interested in the alleged champertous nature of the relationship between the law firms and the clients.

MR. MALONE: I understand, your Honor.

THE COURT: Or the law firms and this claim.

MR. MALONE: As the defendants' own pleadings from September show, what they say in here is true. The governors got together in May of 1999. They voted to move forward with the lawsuits and they voted to hire us. At

that time they also voted money to hire private outside counsel to negotiate the contract. So the contract was actually negotiated -- all these details the defendants are screaming about were never brought up until after the governors voted to go ahead. It sounds odd but that's the way governments work sometimes.

So over the course of May, June and early July, the basic contract was negotiated. It did not include the indemnity agreements that the defendants are complaining about. No one even talked about that. Then in the month of July, the process began of the contracts being signed. Because each governor is a governor just like a governor of a state, you've got to go to them, visit them, have them sign it, et cetera. Over the course of a number of months, the contracts were signed.

The first number of them, I don't know whether it's seven or eight or ten, were signed without any of this material in it concerning indemnity that the defendants consider so champertous. The fact is, your Honor, these people were already our clients before this issue even arose. At some point it's correct, there was a discussion about, should we be protected if there's any sort of -- if we are sued for libel. We said to them, you can't be sued for libel and slander because you file a lawsuit. I didn't say this directly because I wasn't down there but we

basically said, look, if you're worried about it, we'll say you're protected.

Number one, they were already our clients. Number two, your Honor, I think this is a very important point. They've made such a big deal about this supposedly big law in Colombia that they could be sued. What they didn't tell you is this. Under that law, number one, you cannot sue civilly unless your claim is tied to a criminal action. There has to be a criminal prosecution in order for you to make the civil claim.

THE COURT: In other words, the alleged libel, slander has to grow out of allegations --

MR. MALONE: Of criminal conduct.

THE COURT: The allegations that are deemed libel and slanderous upon which you're bringing your action for libel and slander have to have been made in the context of a criminal proceeding?

MR. MALONE: You have to claim it as criminal conduct. The affidavit we filed is, which is absolutely correct and truthful, there is no way that you can bring a claim for libel and slander for the filing of a lawsuit, even under Colombian Law.

THE COURT: But isn't that champertous under New York Law? That is consideration that you're giving to your client --

MR. MALONE: Your Honor, if I may, it's not champertous for two reasons. Number one, you can't commit champerty with a client you already have, who has already said, file the lawsuit. Number two, there really never was any risk of this claim being made. It's like you alluded to a while ago. They can't sue us for libel or slander because we file a lawsuit. This claim that they say exists, even though you --

THE COURT: Maybe you can't, but it's still a consideration given as an inducement.

MR. MALONE: It was not an inducement because they'd already decided to hire us. They were signing the contracts. Let me explain something else, your Honor. This statute that they say allows a suit that my clients were so afraid of -- the maximum claim under that kind of a suit is 1,000 grams of gold, which is basically $10,000. The maximum attorney's fee is 5% of the recovery. So they make such a big deal about how my clients were so afraid of this, when in reality the maximum suit, even if it had been allowable, was $10,000 and a $500 attorney's fee.

THE COURT: So why was it important enough for them to stick on it -- to either ask for or raise it as an issue to be put into the agreement?

MR. MALONE: That's my point, your Honor. This was a nothing issue. If we'd said, no, we can't do this,

they'd have said fine. They didn't care. It was just something that came up in the course of a conversation.

THE COURT: So is it open to me to say that as a remedy, instead of disqualification, we should just strike that portion of the agreement to eliminate any claim that it's champertous?

MR. HALLORAN: Your Honor, if I might address the issue of champerty, the record is clear --

THE COURT: I'll let you do that in a second. I'll let Mr. Malone address something else and you can address that in a moment.

MR. MALONE: Your Honor, let me give you the short answer to that. We discussed this with the clients. The problem is this. For many of these clients, it is a multi-month process to sign or amend a contract. We have to go from one Department to the other, 26 governors and the Mayor of Bogota. We would have to go through all this with every one of them to get this done. It would take us minimum three, four, five months to do this.

Your Honor, it's not champertous and it would be incredibly onerous and burdensome on us and the Departments if we had to do it. A few clients we talked to, we said, would you get rid of it as opposed to losing us, and they said yes, we'll do that. But that doesn't obviate the fact that we would still have to spend six months to do it on 26

clients.

THE COURT: I suppose the Court could -- doesn't the Court have some authority to just strike the provision? They can always decide not to -- they can govern themselves accordingly, knowing that the Court -- that it's not operative.

MR. MALONE: Your Honor, I truly don't know what the Court's power is in that regard. I would say I think you should keep in mind that these are governmental entities.

THE COURT: They're governmental entities but they've come to this country to seek redress under this country's laws. I'm not trying to -- they don't deserve any special protection because they happen to be governmental entities.

MR. MALONE: I'm not suggesting that, your Honor. I'm saying that this is a much more difficult and cumbersome process than if these were 26 individuals hurt in a bus accident or something. It is truly a huge burden on these people to do this.

THE COURT: Okay.

MR. MALONE: Your Honor, may I make two more comments on factual matters and then I'll defer to Mr. Halloran, because I think they're very important. First of all, these allegations that there is fee splitting between

us and Berg are absolutely wrong. They're completely untrue. I think I have explained that in some detail already, that Berg was working for the Colombians even before we became involved in this. But I want to assure the Court that that is absolutely untrue and it is ludicrous that they could jump to such a conclusion without any basis at all.

THE COURT: Did you have anything to do with negotiating Berg's deal with the Colombians?

MR. MALONE: No, your Honor. What basically happened was --

THE COURT: When I said the Colombians, I meant the Departments.

MR. MALONE: Only in the most indirect sense, in that the Colombians wanted the contracts to be consistent. Here's basically what happened.

THE COURT: Consistent with each other, you mean.

MR. MALONE: Correct. The Berg firm had a Washington, D.C. law firm, number one, give them an opinion that it was ethical for them to have a contingent fee contract, and number two, prepare a contract for them for submission to the Colombians. The contracts then were handed over the legal departments of the various Departments, including City of Bogota. One of their attorneys is here today. They worked on these contracts.

So the extent that we would talk about an issue in our contract and they thought it was advisable to have something similar in the Berg contracts, yes, there would be similarities. But it is a common practice in Colombia for investigators to be hired on a contingency basis. In fact, numerous government agencies actually have form contingency contracts that they use to hire investigators on a contingency basis.

Although the defendants kind of tried to make an oral argument to you today that the Berg contract is somehow unethical, they never made that allegation in their pleadings because they can't, because the simple fact is the Berg contract is completely and totally ethical. A very prominent Washington, D.C. law firm approved it under the Laws of Maryland.

THE COURT: That doesn't make it ethical, sadly.

MR. MALONE: My point is this is not something that was just thrown together. They took the time to get a Washington firm to approve that they could have a contract like this, that the contract was acceptable. There is nothing unethical about the contract.

THE COURT: Standing alone, I haven't been cited to any provision of any law in New York, or anywhere else for that matter, that says that investigators can't be paid on a contingent basis.

MR. MALONE: That's right. There's nothing wrong with that, your Honor. When they get to this whole taint of trial thing, if the investigators are paid on a contingent basis, they're on a contingent basis. If there's any suspected taint because they're motivated, it's the same anyway. The defendants have struggled mightily to come up with a legitimate argument that there's a taint of trial here, your Honor, and they can't. There just is no taint of trial. There is no taint of the proceedings even under their view of the facts, even though their view of the facts are completely wrong.

THE COURT: What about the notion that they've argued strenuously that by virtue of your control over the lawsuit, you in essence do have a proprietary interest in the lawsuit and the lawsuit wouldn't have been brought but for the fact that you made these arrangements.

MR. MALONE: Your Honor, first of all, you already have an affidavit from the Governor of Bolivar, who says the opposite, that it had nothing to do with it. I'd also point out to the Court, if I may approach the bench, this is the defendants' pleading from September on their motion to stay, and you can see where I've highlighted -- ever since September, they have steadfastly taken the position that the Departments made the decision on their own in May, 1999, after investigating this thing since 1997.

So when it was convenient for them to say that the decision was made in '99, that's what they said. Today, for this motion, that theory doesn't work for them, so all of a sudden, they come up with an alternative theory that we went in there and sweet-talked them into it sometime in 1999. The simple fact is, your Honor, the governors made up their minds. They knew what they wanted to do. They voted to do it in May, 1999 and they did it.

THE COURT: Okay. What role is this Sachs & Smith firm --

MR. MALONE: Your Honor, the Sachs & Smith firm are co-counsel on the case. They are active. Representatives of Sachs & Smith have been present at every hearing other than today. It just happened that they weren't here today. The weather looked real bad.

THE COURT: But they're a Washington-based firm. What, they happened to have an office in New Orleans?

MR. MALONE: No. Sachs & Smith's primary offices are in Philadelphia and in New Orleans. Your Honor, it's four days before Christmas. There are Jewish people who have the religious days of theirs to observe. They called me up yesterday and said, Kevin, do we really have to go to this one? I said, no, you don't, but they've had somebody at every other hearing, your Honor.

THE COURT: Mr. Halloran, is it?

MR. HALLORAN: Yes, your Honor.

THE COURT: Are you done? I don't mean to cut you off.

MR. MALONE: I'm done, unless you have a factual question, your Honor.

THE COURT: I may. I think you answered the first one that I had.

MR. HALLORAN: Your Honor, after sitting through the oral argument on this, I think this Court has a full appreciation of the issues on this. Mr. Malone identified for your Honor exactly the record cite that I wanted to with respect to the issue of champerty. Both the Governor of Bolivar and the Governor of Norino (ph) have submitted affidavits to this Court.

Paragraph 10 of each demonstrated that the allegedly offensive provisions in this case had absolutely nothing to do and no inducement whatsoever for their decision to go forward with this action or their decision to hire the law firms of Sachs & Smith and Krupnick, Campbell. Mr. Malone pointed that out. I just wanted to bring that to your specific attention.

THE COURT: Why aren't they champertous under New York Law?

MR. HALLORAN: Because number one, your Honor, under New York Law, the Criminal Statute 488, there has to

be an inducement to enter into the contract. As Mr. Malone pointed out and as the record clearly shows, the Departments of the Republic of Colombia made the decision to retain these lawyers and to proceed with this action on May 10th, 1999. Under Louisiana Law and other law as well, you can't commit champerty with an existing client. There was no inducement whatsoever to commence these actions by virtue of the allegedly offensive provisions.

THE COURT: What about New York Law?

MR. HALLORAN: Under New York Law, the provisions are compatible with New York Law.

THE COURT: You said that under Louisiana Law it's not champertous if there's something given after the relationship has been established. I think that's what you're saying.

MR. HALLORAN: Yes, your Honor.

THE COURT: What's New York Law on that?

MR. HALLORAN: Under Section 488, the Criminal Statute, the Misdemeanor Statute, there has to be an inducement as well. There has to be a consideration, a thing of value given. Under the facts of this case, as the Governor of Norino and Bolivar show --

THE COURT: Why isn't it a consideration? Isn't that a consideration? If you're agreeing -- you're giving something of value, clearly something that the Departments

thought was valuable because they asked for it. Isn't it an inducement? It's part of the contract. You'd normally assume that's something that's part of the contract was part of the bargain for exchange.

MR. HALLORAN: Your Honor, the record shows that the decision to hire these law firms occurred on May 10th, 1999, well in advance of even the agreement or drafting of these allegedly offensive provisions. So while this Court may consider it a thing of value, and I would disagree that it is in fact a thing of value, the fact of the matter is it's not an inducement under any stretch of the imagination.

The issue under New York Law is with respect to proprietary interests. I read the commentary. Your Honor is clearly familiar with that. There has been no cash on the barrelhead exchanged to purchase a claim. There has been no assignment of the claim. There is nothing like what occurred in Peggy Waltz (ph), where there was a proprietary interest in copyrighted intellectual property.

This is nothing like Norma Brothers versus Earl Fashions (ph) that Mr. Rolfe referred to, where the attorney was an assignee of accounts receivable. Those cases are far afield from what's occurred here, your Honor.

THE COURT: That's the one with Judge Keenan? That's Judge Keenan's case you're talking about?

MR. HALLORAN: Yes, your Honor.

THE COURT: In that case, the attorney was the assignee of --

MR. HALLORAN: Accounts receivable that were the subject matter of the action. Thank you, your Honor.

MR. NATHAN: May I be heard briefly, your Honor?

THE COURT: Yes.

MR. NATHAN: The key distinction here, your Honor, is a question between allegedly hiring a law firm -- of course, there's no documentation of them hiring a law firm in May. There's a press release that says the Departments intend to sue. The indisputable fact is no lawsuit was filed until May, 2000, after all of these retainer letters were signed. There is not a single thing in the record to show that any Department authorized these attorneys or any other attorneys to file suit until they got the agreements that were negotiated and are before you now.

So, your Honor, clearly -- the record is pretty clear that unless they got these provisions with respect to the indemnification, with respect to the attorney's fees, with respect to the costs, with respect to the ownership of the claim, these lawsuits were not going to be brought. The plaintiffs weren't going to bring the suits until they had the retainer letters signed and sealed and they were negotiated, and they obviously involved valuable consideration.

With respect to the Champerty Law, which is a penal statute in New York, it requires one of two things; either an inducement to placing the claim or a consideration of having it placed in the attorney's hands, one or the other. It's obviously one or the other but more importantly, your Honor, for the ethical principle, is it not permitted -- it couldn't be clearer in the ethical rules.

It says a lawyer may not pay or guarantee financial situations to the client. You cannot guarantee a debt of the client. In the Ettlestein (ph) case --

THE COURT: Aren't they talking about paying the expenses of a lawsuit?

MR. NATHAN: No, your Honor, it's the opposite. What they're saying is an exception to this rule in New York is you can advance the expenses of a lawsuit and that is an exception to the rule that you cannot pay or guarantee the debts of a client. But with respect to anything other than the expenses of a lawsuit, such as the sanction orders or a judgment or the judgement in the counterclaim, that is a guarantee of financial assistance and it is absolutely forbidden, without regard to whether it's an inducement under the ethical rules.

THE COURT: I understand. You're trying to sort of transmogrify that into a proprietary interest.

MR. NATHAN: No, that's a different situation.

THE COURT: As I said before -- I think I understand your argument. Your argument is -- tell me if I'm wrong -- you want me to extend the holding in Macalpin. You want me to recommend that counsel be disqualified because of champerty.

MR. NATHAN: That is correct, in part. There are other provisions here but let me say this, your Honor, and I say this with sadness. I honestly believe and represent as an Officer of the Court that I have good reason to believe that some of the statements that you heard from Mr. Malone today are not accurate. What he is asking you to do is to accept their version of facts with respect to the negotiations of these arrangements and asking you to accept a form affidavit by 2 of 26 people who say this wasn't an inducement, without us having access, without this Court having access to the underlying documents and people that were involved.

Your Honor, I say two things. The retainer letters and the negotiations leading to them are not privileged in the Second Circuit. There are numerous cases in the Second Circuit. I'll give you many cites if you want; Lefcourt against United States (ph), 125 F.3d 79, In Re: Grand Jury Subpoena, 781 F.2d 238, numerous cases where the matter is pertinent have required production of the

retainer agreements and related documents.

Further, your Honor, it has to be the case that they cannot come here, as they did in their papers and as they do today, and give you a version of facts that they ask you to rely on without giving us access to the basic documents that led up to this, the drafts and the correspondence just relating to the retainer letters, to demonstrate that in fact these are inducements and were inducements to the bringing of the suit and that but for these terms, these suits would never have been brought.

I have, your Honor, prepared a request for production of documents. It only asks for five sets of documents. With your permission, I'd like to hand it to the Court and to counsel.

THE COURT: This is production of documents in what case?

MR. NATHAN: In the combined cases, because it asks two things, your Honor. I think that the statements made by Mr. Malone demonstrate that there is a complete correspondence -- there is an intermingling of the European case and the Colombian case, and I think it's very important that we see the retainer letters in the European case, to see how they compare and contrast to these retainer letters in Colombia.

THE COURT: And the basis for that is because?

MR. NATHAN: Because Mr. Malone said today that Sachs & Smith and his firm were working with the European -- he said they weren't clients, we didn't have a retainer letter with them, but we were doing work with them. But then we heard about the Colombian situation and then we went over to Colombia and then we negotiated in Colombia the retainer letters, and then we were advised only for the first time in late September that these lawyers represented the European community. Then they waited until the lawsuit was filed in Colombia, the Colombia Department suit was filed, and then they announced they were going to file the European case, which they filed in the same court.

The judge has now consolidated these matters and I think we're only seeing half the picture here if we only see the retainer letters in the Colombian case. What we don't have here, your Honor --

THE COURT: The only thing those are relevant to is a disqualification of counsel motion.

MR. NATHAN: And a possible dismissal of the action; that's correct.

THE COURT: I haven't seen any case where an action was dismissed because of a retainer agreement. That's what you're asking me to do. I guess you're basing that on the fact that this case would not have been brought but for --

MR. NATHAN: Let me say one thing about that, too. Since these cases have been brought -- they were brought in May of 2000. There have been elections in Colombia, in these Departments. Because of the law in Colombia, which is that no governor can succeed himself, every one of these plaintiffs has a new governor since the time of the filing of the suit, more than half of which are from a different party than the previous one.

You're quite right that governments deserve no special break because they're a party. We will be dismissing because they have no standing here but that's a different question. But they certainly should have the opportunity to consider this matter afresh, without these pending, unethical provisions.

What I'm asking this Court to do is, given the fact that this has become so fact intensive in the discussions, to give us -- I ask only for two weeks to have this Court consider our request for production of documents, ask the plaintiffs to provide the documents that we are asking for.

I am not going to ask for depositions, though I do want the opportunity to call witnesses to a hearing before this Court to demonstrate, to show the documents and to call witnesses from Colombia, to show that these were in fact inducements and that but for what are a series -- it's not

one and it's not two. It's at least four significant ethical violations that are contained in the retainer agreements -- these lawsuits would not have been brought.

Let me say that Judge Garaufis specifically said, when he referred this to your Honor in court on the record, that this Court, the Magistrate, may wish to take some limited evidence on the question, and I think frankly that was a basis for referring it for a report and recommendation.

In our reply brief, your Honor, we said to the judge, we believe we can argue this matter as a matter of law on the undisputed facts and present it to your Honor. But if you think there's any basis for these factual matters that the plaintiffs have raised in their papers, we ask you to refer it to the Magistrate for an evidentiary hearing and for a report and recommendation.

We listed in that reply brief the kinds of questions that we would want to ask in such an evidentiary hearing, including what were the inducements to bring the suit, when did Speiser, Krause first appear in this matter, why didn't they sign the retainer letters, why was Louisiana Law chosen? I suggest to you that you have not heard the full story on any of those points from the presentation that you heard from Mr. Malone and Mr. Halloran today. I think we can do this very quickly. I am not asking for any delay

in any other aspect of this case.

THE COURT: What are you asking for?

MR. NATHAN: I'm asking for you to review our request for production of documents and to authorize its being served on the plaintiffs. I'm asking that these documents be produced to us within the next ten days and I'm asking that sometime thereafter, at the Court's convenience, that we have an evidentiary hearing, which I represent will not last longer than two days, to present documents and witnesses that will demonstrate exactly the point that your Honor keeps coming back to, which is, can you tell me that these ethical violations are what led to the filing of this suit? Can you tell me that but for these ethical violations, these suits would not have been brought? If we can't demonstrate that to your Honor --

THE COURT: I'm not willing to accept that that's what I have to determine. I've reviewed Saramko and Saramko says the institution of suit in a court does not constitute the kind of prejudice to an adversary from which this Court can or should give relief. I don't think that's the guiding principle for me. That's not the prejudice.

MR. NATHAN: Your Honor, that can't be the case.

THE COURT: I know you say that can't be the case but that's what the court said.

MR. NATHAN: Let me give you this hypothetical.

I'm not saying this happened by any stretch, but suppose these attorneys broke into the defendants' offices, stole their documents and prepared the complaint based on those documents that they had stolen and brought the case. If you think that a violation of those ethics and that criminal law --

THE COURT: That taints the whole process, of course.

MR. NATHAN: Of course.

THE COURT: They got access to information that they shouldn't have had.

MR. NATHAN: Exactly.

THE COURT: That's different. Let me see that.

MR. MALONE: May we address the Court on that, your Honor?

THE COURT: On what?

MR. MALONE: On his motion.

THE COURT: I'm just going to look at it. I'll certainly give you a chance to --

MR. HALLORAN: We haven't seen this before, your Honor.

THE COURT: I haven't either.

MR. MALONE: I don't need to see it to reply, your Honor.

MR. NATHAN: The requests themselves, your Honor,

start at page 5.

(Pause in Proceedings)

THE COURT: I'll have to take these under advisement pending a decision on the motion that's now before me. Right now leave to serve --

MR. NATHAN: Your Honor --

THE COURT: You don't have to respond.

MR. MALONE: Thank you, your Honor.

THE COURT: You served them so you have them, but there's no obligation to respond at this point.

MR. MALONE: Thank you, your Honor.

MR. NATHAN: In that regard, your Honor, may I cite to you cases or can we file a two-page or three-page document that demonstrates that given what has happened here so far in the motion that we are entitled to these documents? There are numerous cases in the Second Circuit that hold not only that a retainer is not privilege but also that providing information --

THE COURT: That's not all that you've asked for here. You've asked for a lot more than a retainer agreement.

MR. NATHAN: Exactly.

THE COURT: If you're asking just for the retainer agreement -- you're asking for more.

MR. NATHAN: I'm asking for more. Let me say that

what I'm saying to you is that Second Circuit law, if I can file a three-page document, says --

THE COURT: Why don't you just give me the case.

MR. NATHAN: I'll give you a series of cases. As I cited before, in terms of the privilege I'd cite Lefcourt against United States, 125 F.3d 79, In Red: Grand Jury Subpoena, 781 F.2d 238, both Second Circuit cases.

THE COURT: Regarding the fact that the retainer agreement aren't privileged.

MR. NATHAN: Right. But then I also want to cite to your Honor two cases. One is United States v. Belzarian (ph), 926 F.2d 1285, 1292, a Second Circuit case in 1991, and a case In Red: Grand Jury Proceedings, 219 F.3d 175, Second Circuit 2000, which stands for the Fairness Doctrine, which says that you cannot use privileged information as a sword and a shield at the same time. You cannot disclose part of the story and give your version of events and then hide behind the privilege as to the whole picture and the whole story, that fairness requires that there be some discovery here --

THE COURT: I understand. Who's trying to use it as a sword? I don't see that. They're trying to defend themselves against your claims.

MR. NATHAN: Your Honor, they are claiming --

THE COURT: They're not asking you to do anything

except back off.

MR. NATHAN: The fact is, your Honor, that they submit affidavits to you by two former governors who say this wasn't inducement to us. I say if I show you the correspondence with those individuals and notes of conversations with them and with other governors here, you will have no doubt that this was an inducement to bring the lawsuit.

THE COURT: I understand. I have to determine whether, even assuming that it is an inducement, whether that warrants the Court getting involved in disqualifying counsel. That's the fundamental question and I just have to consider that.

MR. NATHAN: Our position is that anything that taints the proceedings and anything that --

THE COURT: Taint is sort of a general word. It doesn't mean much by itself. I don't know what you mean by taint other than -- I guess your argument is it taints the proceedings in that but for this champertous provision, the lawsuit would never have been brought.

MR. NATHAN: Exactly.

THE COURT: It's about 5:00. I don't think I'll have a decision on this -- I'll have to consider whether or not -- you would like to conduct an evidentiary hearing on this inducement issue.

MR. NATHAN: Yes, your Honor, for no more than two days and with respect to those documents that we asked for.

THE COURT: I'm going to go back and consider things. It's now 5:00. I'm going to ask you to stay until 5:30. I may be able to decide this by then, make a ruling on the record. If I can't, then I'll let you go.

(Tape off, tape on)

THE COURT: I am going to make a recommendation on the record now. Based on all the papers that have been submitted on the motion to disqualify and on the arguments today, my recommendation to Judge Garaufis is that the motion for disqualification be denied in its entirety.

In making that recommendation, I'm guided by the standard for disqualification in the Second Circuit, which has been succinctly stated in Bottaro versus Hatton Associates, 680 F.2d 895 at 896. This is a Second Circuit case decided in 1982. I quote from that case: "This court has adopted 'a restrained approach', citing Armstrong versus Macalpin, 625 F.2d 433, 444, which calls for disqualification only upon a finding that the presence of a particular counsel will taint the trial by affecting his or her presentation of a case, citing Board of Education versus Nyquist (ph), 590 F.2d 1241 at 1246, and Macalpin, 625 F.2d at 444-46."

I specifically reject the argument that the Getner

case cited by counsel in some way changes that analysis, since the Getner case, in dealing with the issues before it, did not examine in any detail whatsoever the standards set forth in Bottaro versus Hatten or Armstrong, but simply said that it is a court's duty and responsibility to disqualify counsel for unethical conduct prejudicial to counsel's adversary, citing Saramko, Inc. versus Lee Pharmaceutical, 510 F.2d 268 at 271. But in making that statement, the court did not in any way, in this Court's view, mean to expound upon or expand what had previously been said in Bottaro versus Hatten Associates, as previously cited by the Court.

Thus the question before this Court is not whether ethical violations have occurred. The question is whether any ethical violations that may have occurred because of the particular attorneys' representation of the particular clients here are of a character that they taint the trial process. The Second Circuit has identified only two areas of concern in that regard.

I quote now from Board of Education versus Nyquist, 590 F.2d 1241 at 1246. "In other words, with rare exceptions, disqualification has been ordered only in essentially two kinds of cases; one, where an attorney's conflict of interest in violations of Canons Five and Nine of the Code of Professional Responsibility under mines the

court's confidence in the vigor of the attorney's representation of its client." I'm going to omit the citations. "Or, more commonly, two, where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation, for example in violation of Canons Four and Nine, thus giving his present client an unfair advantage."

Counsel concedes neither of those apply in this case. The court I note has exhibited a willingness -- I'm talking about the Second Circuit -- to tolerate even unethical conduct by an attorney, so long as it does not taint the trial process. I quote again from Board of Education versus Nyquist at 1246. "But in other kinds of cases, we have shown considerable reluctance to disqualify attorneys despite misgivings about the attorney's conduct." I'll omit the citations. "This reluctance probably derives from the fact that disqualification has an immediate adverse impact on the client by separating him from counsel of his choice and that disqualification motions are often interposed for tactical reasons" -- I'll again omit the citations -- "and even when made in the best of faith, such motions inevitably cause delay."

That analytical approach that was first espoused in Board of Education versus Nyquist was considered and adopted and endorsed by an en banc panel of the Second

Circuit in Armstrong versus Macalpin, which I've previously cited, and so far as I know has never been undermined by any subsequent decision of the Second Circuit. So my focus is very narrow.

I also specifically reject the notion that prejudice, as that term may have been used or was used in the Getner case, occurs simply because a party has been subjected to the lawsuit. Indeed, Getner cited Saramko, Inc. versus Lee Pharmaceutical and out of that case there is specific language at 271 that the institution of a lawsuit does not constitute the kind of prejudice to an adversary from which this Court can or should give relief. That's 510 F.2d at 271.

Counsel have cited various provisions of the retainer agreements between plaintiffs' counsel and their clients, some of which do on their face raise questions about whether they violate ethical rules. Certainly the agreement to be ultimately liable for expenses is a violation of the disciplinary rule in this Court that's applicable in this District, although the Court also notes that it appears not to be in violation of disciplinary rules that are applicable in the State of Louisiana.

In addition, the provision that provides for indemnity in certain situations by the lawyer to the client raised serious concerns about whether that is a provision

that is ethical under any disciplinary rules in effect in the United States, whether in Louisiana or New York or otherwise.

However, those provisions do raise some fine questions as to what the applicable law is that should be used to analyze the provisions and determine whether there are ethical violations. They raise some questions about whether these provisions were actually inducements for the attorney/client relationship to have occurred at all.

It's this Court's view that it is unwise for a court to get involved in a detailed review of those matters, simply as part of satellite litigation that does not advance the case, at least in the absence of any showing that it taints the trial process. The Court finds nothing in these provisions that taint the trial process or that are likely to taint the trial process, as I understand that phrase announced in the Second Circuit in its disqualification decisions.

Another troublesome provision is the fee-splitting provision or the alleged fee-splitting provision, which the Court does not, by using that language, mean to endorse as a fact, that is that it is in fact a fee-splitting provision. Indeed, there is substantial reason offered by the plaintiffs' counsel to suggest that in fact it is not a fee-splitting arrangement.

Again, the Court believes it is unwise for the Court to get involved in a detailed review of all of the factors and facts and circumstances that gave rise to the specific structuring of that relationship or that set of relationships between the investigators and the clients and between the attorneys and the clients. So in the absence again of any showing that that taints the trial process, the Court is loathe to get involved in that.

The Court notes that the argument is made that the contingent fee relationships between the clients and the investigators gives rise to the distinct possibility that the investigators will seek to manufacture or otherwise manipulate evidence, in an effort to earn their fee. The Court, however, has been directed to no law that prohibits such a contingent fee relationship between an investigator and a client. It is the contingent fee feature that gives rise to the potential taint. It is not the fact that there is or may be a fee-splitting arrangement between the investigators and the attorneys.

In other words, that potential taint to the trial process would exist regardless of whether there was this claimed fee-splitting arrangement, and it's unwise in the Court's view to go into the specific nature of the supposed fee splitting, because that's not going to advance the Court's understanding of any taint of the trial process.

The defendants point to other provisions of the retainer agreements which tend, in their view, to show that the attorneys have such control over the claim that they in essence have a proprietary interest in the claim. The Court rejects that interpretation of the agreement. Certainly nothing in the agreement on its face says that that's the case.

Finally, the defendants make the argument that the Court should in essence expand its review or expand the bases on which disqualification should be ordered beyond that specifically set forth in the Armstrong and Board of Education versus Nyquist cases, to include a case where champerty has been demonstrated, and the Court declines to do that in this case.

The question of whether the relationship is champertous is not one that this Court could easily decide without a detailed review of the facts and detailed hearing and detailed discovery. As I said earlier, that I believe is unwise. Perhaps there is a case where it would be so evident from the face of the agreement or from facts already known that champerty alone would be a basis to disqualify a law firm and indeed perhaps to dismiss an action. This is not that case.

The allegedly champertous provisions in the agreement are not so shocking to the Court as to compel the

Court to believe that they are indeed champertous, that they were the result of lawyers drumming up business. The question in addition of whether they're champertous is again one that is probably not governed by New York Law, because at least as I understand it, the New York provision that's cited is a criminal provision which does not operate beyond the borders of the State of New York, and this relationship it's not claimed arose in the State of New York. Therefore, this Court ought not to, based on the record now before it, get bogged down in an effort to determine whether these perhaps champertous provisions in fact violate some law that may be applicable as a basis to ultimately disqualify counsel in this case.

So for these reasons, I'm recommending that the disqualification motion be denied. I'm going to direct that at transcript of today's proceedings be prepared and be distributed to counsel or be made available to counsel. We'll mail out copies to -- one set to plaintiffs' counsel and one set to the movants on the defendants.

You'll have ten days from the receipt of that transcript to make any objections -- to serve objections to Judge Garaufis. Failure to make objections within that time will waive the right to appeal any order by the District Court that may result from my recommendation. That comes out of Rule 72(b) of the Federal Rules of Civil Procedure as

well as various cases in the Second Circuit and I believe in the Supreme Court as well.

The application that was before the Court for discovery regarding the relationship between the European community and counsel is denied, except insofar as it requests copies of the retainer agreements themselves. I'll give you a chance to brief why that should not be turned over, but typically in contingent fee arrangements, contingent fee agreements are I believe required to be filed in the State of New York, with some office. If they are supposed to be filed, there's no reason why they should not be, it seems to me, made available to opposing counsel. I'll let you be heard on that, either now or within the next several days, if you're not prepared to address it now.

MR. HALLORAN: Your Honor, it's my understanding that based upon the NYCRR applicable to the filing of contingent fee agreements in New York, that the documents are to be kept confidential. That's my understanding. I'd like to check that law and provide that citation to you.

THE COURT: That's fine.

MR. MALONE: Your Honor, I'd also like to mention that because Mr. Nathan had raised this matter orally before Judge Garaufis some time ago, I raised this issue with the European community. They indicate that their contract is extraordinarily confidential and that they wish to very

vigorously oppose any request that they deliver their contract to anyone. With the holiday season being what it is, I don't know what their time frame would be to put together the pleadings that they would like to prepare in that regard.

THE COURT: I have misplaced the request. Let me look at it again.

MR. MALONE: I guess what I'm saying, your Honor -- I know you previously had said that all objections had to be made within ten days. With this particular holiday season, it's extraordinarily difficult for me to get the European community's response done within ten days from the next few days.

THE COURT: Why? They're not going to know any more about the law than you are.

MR. MALONE: Because there are confidentiality rules governing their activities that I think they would want to present to the Court.

THE COURT: Why can't they be cured by some kind of confidentiality order?

MR. MALONE: I guess if you're saying that they would be presented to you for in camera inspection, that's one thing. If you're saying they would be given to the defendants --

THE COURT: What's starting to occur to me is that

perhaps they ought to be produced in camera and then made available to defendants subject to your opportunity to oppose it. Why don't we do that as a first step?

MR. MALONE: Thank you, your Honor.

MR. NATHAN: Your Honor, the only modification I would ask is that I would like to see all executed retainer agreements between the plaintiffs and the European community, not just the last one. It is possible that since we filed this motion there have been amendments to it. So I ask that anything that was executed between them be provided.

THE COURT: I'm going to ask them to produce anything that presently governs -- any agreements that presently govern the relationship.

MR. MALONE: I understand, your Honor.

MR. HALLORAN: Your Honor, may I have a clarification as to when our statement or brief on this matter would be due?

THE COURT: How about January 8th and then January 15th for any opposition?

MR. HALLORAN: We appreciate that, your Honor.

THE COURT: Is that acceptable?

MR. NATHAN: That's fine, your Honor.

THE COURT: Is there any other matter I should address today?

MR. NATHAN: When will the agreements be submitted to the Court?

THE COURT: Why don't you submit the agreements on January 8th as well, contemporaneous with your submissions. I don't need to see them any earlier than that.

MR. MALONE: You mean we're required to produce the contracts even though we're objecting to producing them.

THE COURT: In camera, to me.

MR. MALONE: Okay.

THE COURT: You can appeal that order immediately. I guess what I'm saying is you don't need to wait on the report and recommendation or anything like that. That's a specific order. All I'm trying to say is you have plenty of time to seek relief from that obligation between now and January 8th if you feel it's appropriate.

MR. MALONE: I understand, your Honor.

THE COURT: Anything else?

MR. MALONE: No, your Honor.

THE COURT: We're adjourned.

* * * * * * * * *

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

_____ _____

Elizabeth Barron Date